

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Concord, NC, Employer**

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**Docket No. 19-1723  
Issued: August 24, 2020**

*Appearances:*

*Erik B. Blowers, Esq., for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

CHRISTOPHER J. GODFREY, Deputy Chief Judge

JANICE B. ASKIN, Judge

**JURISDICTION**

On August 14, 2019 appellant, through counsel, filed a timely appeal from a June 18, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has established that the acceptance of her claim should be expanded to include additional conditions as a result of her accepted employment injury;

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

and (2) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 18, 2019.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 6, 2012 appellant, then a 37-year-old sales distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her right shoulder when she lifted a package out of a cage while in the performance of duty. On December 27, 2013 OWCP accepted the claim for right shoulder strain and authorized right shoulder arthroscopic rotator cuff repair, which was performed on July 30, 2014. It paid appellant wage-loss compensation on the periodic rolls as of July 31, 2014.

In a letter dated September 29, 2017, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on a September 13, 2017 report from Dr. Joseph Estwanik, a second opinion Board-certified orthopedic surgeon. By decision dated December 4, 2017, it terminated her wage-loss compensation and medical benefits, effective December 1, 2017, finding that the weight of the medical opinion evidence rested with Dr. Estwanik.

On March 6, 2018 appellant, through counsel, requested reconsideration. By decision dated May 8, 2018, OWCP denied modification of the December 4, 2017 decision. It also noted that counsel had requested expansion of appellant's claim to include right rotator cuff tear.

On June 19, 2018 appellant, through counsel, appealed to the Board. By decision dated March 22, 2019, the Board reversed in part and set aside in part OWCP's May 8, 2018 decision.<sup>4</sup> The Board reversed the termination of appellant's wage-loss compensation and medical benefits as it found OWCP had not met its burden of proof to terminate her benefits effective December 1, 2017. The Board found Dr. Estwanik's opinion of diminished probative value insufficient to support OWCP's burden of proof since it was unclear whether his opinion was on an accurate SOAF. The Board further found that the claim was not in posture for a decision as to whether acceptance of the claim should be expanded to include a consequential right rotator cuff tear. The case was remanded to OWCP to request that Dr. Estwanik provide a supplemental report which addressed whether acceptance of appellant's claim should be expanded to include additional conditions.

Following the Board's decision, on May 3, 2019, OWCP paid appellant wage-loss compensation on the supplemental rolls for the period December 1, 2017 through April 27, 2019. On May 25, 2019 it paid her wage-loss compensation on the periodic rolls commencing April 28, 2019.

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<sup>3</sup> Docket No. 18-1300 (issued March 22, 2019).

<sup>4</sup> *Id.*

On May 3, 2019 OWCP prepared a new SOAF and on May 9, 2019 OWCP again referred appellant for a second opinion examination with Dr. Estwanik for an assessment of her work-related condition including whether her claim should be expanded to include additional conditions due to the accepted December 6, 2012 employment injury.

Dr. Estwanik, in a June 5, 2019 supplemental report, noted his review of additional medical records and he provided examination findings. Based on his review of medical evidence from September 13, 2017, Dr. Estwanik suggested that the rotator cuff repair surgery was unrelated to the accepted December 6, 2012 employment injury. In support of this conclusion he noted that the July 30, 2014 surgical report confirmed intact rotator cuff muscles and a magnetic resonance imaging (MRI) scan demonstrated no tearing of the rotator cuff. Dr. Estwanik referenced additional records, which he described as repetitive, confirmed intact rotator cuff muscles and tendons. He again opined that appellant was capable of performing her date-of-injury job and that her accepted right shoulder strain had resolved with no residuals.

By decision dated June 18, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, based on Dr. Estwanik's opinion that she no longer had any disability or residuals due to her accepted right shoulder sprain.

### **LEGAL PRECEDENT -- ISSUE 1**

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>5</sup>

To establish causal relationship between a condition and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.<sup>6</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that this case is not in posture for a decision as to whether appellant's claim should be expanded to include additional conditions causally related to the accepted December 6, 2012 employment injury.

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<sup>5</sup> See *S.L.*, Docket No. 19-0603 (issued January 28, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>6</sup> See *S.L.*, *id.*; *T.E.*, *id.*; *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

<sup>7</sup> See *S.L.*, *supra* note 5; *M.M.*, Docket No. 19-0061 (issued November 21, 2019); *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

On prior appeal, the Board remanded the case for OWCP to obtain a supplemental report from Dr. Estwanik addressing whether appellant's claim should be expanded to include additional conditions due to the accepted December 6, 2012 employment injury. On remand, OWCP requested that Dr. Estwanik provide an opinion as to whether the claim should be expanded to include additional conditions as work related. In his June 5, 2019 report, Dr. Estwanik failed to provide an opinion on the issue which was the basis for the Board's prior remand. As OWCP undertook development of the issue of claim expansion, it had the responsibility to resolve the issue. Once OWCP undertook development of the evidence by referring appellant back to the second opinion physician, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.<sup>8</sup>

The case must therefore be remanded for consideration of whether acceptance of appellant's claim should be expanded to include additional conditions as causally related to the accepted December 6, 2012 employment injury. Appellant shall be referred to a new second opinion physician to opine the issue of whether the claim should be expanded to include additional conditions as work related. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.<sup>9</sup> It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment injury.<sup>10</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>11</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>12</sup> To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.<sup>13</sup>

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<sup>8</sup> *M.S.*, Docket No. 19-1401 (issued July 8, 2020); *T.N.*, Docket No. 10-1810 (issued May 25, 2011).

<sup>9</sup> *S.P.*, Docket No. 19-0196 (issued June 24, 2020); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>10</sup> See *S.P.*, *id.*; *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>11</sup> *D.G.*, *supra* note 9; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>12</sup> *S.P.*, *supra* note 9; *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

<sup>13</sup> *D.G.*, *supra* note 9; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

## ANALYSIS -- ISSUE 2

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 18, 2019.

The Board has held that compensation benefits constitute a property interest protected by the due process clause.<sup>14</sup> Pursuant to OWCP's procedures, before terminating appellant's wage-loss compensation and medical benefits, the claims examiner was responsible for advising her of the proposed termination or reduction, the reasons for the proposed action, and of an opportunity to respond in writing.<sup>15</sup> Pretermination notices are required in cases in which compensation is being paid on the periodic rolls<sup>16</sup> and are also required in cases where all medical benefits are being terminated based on the medical opinion of a referee or second opinion physician.<sup>17</sup> The Board has held that OWCP must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.<sup>18</sup>

The Board finds that when OWCP terminated appellant's benefits on June 18, 2019 she had again received wage-loss compensation on the periodic rolls as of May 25, 2019. Furthermore, OWCP terminated her medical benefits based upon Dr. Estwanik's report. However, based upon the Board's ruling as to Issue 1, as well as because appellant should have received proper pretermination notification as she was being paid wage-loss compensation on the periodic rolls and medical benefits, the termination must be reversed. OWCP should have provided her with notice that it intended to terminate her wage-loss compensation and medical benefits, and OWCP should have provided her an opportunity to submit evidence supporting continuing employment-related residuals of her accepted condition.<sup>19</sup> It should have also fully developed the issue of claim expansion and whether the additional conditions, if any, resulted in continuing disability from work.

Due process and elemental fairness require that a claimant under the circumstances presented have notice and an opportunity to respond to the termination of benefits.<sup>20</sup> The Board finds that the termination was improper and will be reversed.

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<sup>14</sup> C.A., Docket No. 18-0470 (issued March 7, 2019); *Felix Voyles*, 46 ECAB 895 (1995).

<sup>15</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(b) (February 2013); see also *Winton A. Miller*, 52 ECAB 405 (2001).

<sup>16</sup> J.S., Docket No. 17-0937 (issued December 14, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> S.S., Docket No. 19-1091 (issued December 3, 2019); *supra* note 15.

<sup>19</sup> *Id.*; K.S., Docket No. 11-2021 (issued August 21, 2012).

<sup>20</sup> S.S., *supra* note 18; D.R., Docket No. 14-1688 (issued April 8, 2015).

### **CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 18, 2019. The Board further finds that this case is not in posture for decision as to whether acceptance of the claim should be expanded to include additional conditions as a result of her accepted employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 18, 2019 is reversed in part, set aside in part, and the case is remanded for further action consistent with this decision of the Board.

Issued: August 24, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board